TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES EX RELATIONE GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 14, 1936.

CERTIORARI GRANTED MARCH 15, 1937.

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United States Court of Appeals for the District of Columbia

No. 6618.

U. S. ex rel. Girard Trust Co., etc., appellant,

vs.

Guy T. Helvering, Commissioner of Internal Revenue.

a Supreme Court of the District of Columbia.

At Law.

No. 85102.

United States ex Relatione Girard Trust Company, Trustee under the will of John A. Brown, Jr., Deceased, Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent.

United States of America,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 85102.

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Board and Chestnut Streets, Philadelphia, Pennsylvania, Petitioners,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.

Petition for Writ of Mandamus.

Filed February 20, 1935.

The petition of Girard Trust Company, trustee under the will of John A. Brown, Jr., deceased, respectfully represents to the Court as follows:

1. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, transacting business in the city of Philadelphia, Pennsylvania, is a trustee under the will of John A. Brown, Jr., deceased, and brings this suit in its capacity as such trustee. Said John A. Brown, Jr., (hereinafter called the decedent) died July 17, 1919, a resident of Newtown Township, Delaware County, Pennsylvania, leaving a last will and codicil thereto which were duly probated before the Register of Wills of said county, by the terms of which he gave, devised and bequeathed to petitioner, in trust, all of his residuary estate.

2. The respondent, Guy T. Helvering, is Commissioner of Internal Revenue of the United States, and is charged
2 by Section 3220 of the Revised Statutes with the power and duty to remit, refund and pay back all taxes wrongfully, erroneously or illegally assessed or collected, with interest on amounts so refunded at the rate of six per cent per annum. The respondent is sued in his official capacity as such Commissioner of Internal Revenue.

3. Attached hereto, marked Exhibit A and made a part hereof, is a true and correct copy of the will of said de-

cedent, executed April 14, 1913, and of the codicil thereto, executed February 10, 1919, both of which documents were admitted to probate by said Register of Wills on July 23, 1919, and letters testamentary were duly issued on the same date to petitioner as executor of said will. On December 30, 1920, petitioner, as said executor, delivered to itself as trustee under said will, the residuary estate so devised to it as such trustee, and at all times since that date petitioner has been the duly qualified and acting trustee of said estate.

4. Decedent's widow, Harriett Etting Brown, (hereinafter called the widow) by writing duly signed, acknowledged, delivered to decedent's executors and duly filed and recorded, as required by the statutes of Pennsylvania, elected to take under the said will and codicil in lieu of taking the interest allowed her in decedent's estate by the law of Pennsylvania.

5. During the years 1924 to 1930, inclusive, petitioner as such trustee currently distributed to the widow the entire net income of the trust. Petitioner duly filed with the Collector of Internal Revenue returns of income for said trust estate for each of said years, and, in computing the net taxable income of said trust estate, it deducted from gross income the amounts so distributable and distributed to the widow, pursuant to the provisions of section 219(b)(2) of the Revenue Act of 1924, and corresponding provisions of subsequent Revenue Acts. Such distributions were reported as income by the widow in her federal income tax returns for each of the years 1924 to 1927, inclusive, but she did not report the same as income in her returns for 1928 and subsequent years.

6. On March 15, 1929, the then Commissioner of Internal Revenue, pursuant to the provisions of Section 274 of the Revenue Act of 1926, notified petitioner of his determination of deficiencies in income taxes due from petitioner as such trustee, for the years 1924 and 1925, in the respective amounts of $37,252.40, and $40,361.72. In his determination of said deficiencies the Commissioner of Internal Revenue, as the sole ground therefor, disallowed as deductions, in computing the taxable net income of said trustee, the amounts of the income of the trust estate so distributed by petitioner to the widow for the years 1924 and 1925.

7. Thereafter, on May 11, 1929, petitioner duly filed with the United States Board of Tax Appeals its petition in

Docket No. 44,369 for a redetermination of the deficiencies so claimed for the years 1924 and 1925 by said Commissioner of Internal Revenue. On June 23, 1931, the Board of Tax Appeals entered its decision, wherein it held that there were deficiencies due from petitioner as such trustee, in the respective amounts of $30,278.28 for the year 1924, and $16,580.85 for the year 1925. On December 21, 1931, petitioner duly filed with the United States Circuit Court of Appeals for the Third Circuit a petition for review of said decision of the Board of Tax Appeals, and on April
4 26, 1933, said Circuit Court of Appeals entered its order disallowing the deficiencies determined by the said Board of Tax Appeals, and holding that petitioner was entitled to deduct amounts so distributed to said widow, in computing the net income of the trust estate subject to tax.

8. The assessment or collection of the deficiencies for 1924 and 1925 so determined by the Board of Tax Appeals was not stayed by the filing of a bond, pending review by said Court, and the then Commissioner of Internal Revenue assessed the same against petitioner and on February 9, 1932, petitioner paid the amounts thereof, together with interest thereon of $12,453.91 for 1924 and $5,825.10 for 1925.

9. Pursuant to the mandate of the Circuit Court of Appeals, the Board of Tax Appeals on July 7, 1934, entered its decision, wherein it ordered and decided that there were no deficiencies due from petitioner for the years 1924 and 1925, and that petitioner, as such trustee, had overpaid its taxes for said years in the respective amounts of $30,278.28 and $16,580.85.

10. On January 22, 1931 the then Commissioner of Internal Revenue, pursuant to the provisions of Section 272 of the Revenue Act of 1928, notified petitioner of his determination that there was a deficiency in income taxes due from petitioner as such trustee in the amount of $10,262.28, for the year 1928. Thereafter, on March 6, 1931, petitioner duly filed with the United States Board of Tax Appeals its petition in Docket No. 53426 for a redetermination of said alleged deficiency, and on September 29, 1934, the said Board entered its decision therein, finding (a) that there was no deficiency for said year, (b) that petitioner
5 had made an overpayment of tax in respect of the

year 1928 in the amount of $4,376.39, (c) that no claim for refund of the same had been filed, and (d) that the overpayment was made within two years before the filing of the petition therein. No petition for review of said decision was filed, and the decision became final on December 29, 1934.

11. There are no income, war-profits, or excess-profits taxes, or instalment thereof, due from petitioner for any year or period.

12. Since September 29, 1934, petitioner has demanded of respondent that said amounts paid pending Court review, as more fully stated in paragraphs 7 and 8 hereof, and said overpayment determined by the Board, as more fully set out in paragraph 10 hereof, be refunded to petitioner together with interest thereon as provided by law, but respondent has failed and refused to refund said amounts or any part thereof, basing his refusal so to do upon the following grounds:

That the widow included in her returns and paid the Federal income tax imposed upon the amounts of trust income distributable and distributed to her for 1924 to 1927, inclusive, but thereafter filed claims for refund of such taxes, and respondent refunded same to the widow; that such refunds were erroneously made, as a matter of law, but that respondent is now barred by the statute of limitations from recovering same from the widow; that the widow owes income taxes for the years 1928 to 1930, inclusive, the assessment and collection of which are barred by the statute of limitations; that the aggregate amount of such barred claims against the widow exceeds the amounts due as refunds to petitioner; and that respondent is entitled to apply such refunds due petitioner to the extinguishment of such barred claims against the widow.

6 13. Petitioner alleges that respondent is without authority to offset against refunds due petitioner any alleged claims against the widow; that in refusing to make such refunds to petitioner, respondent is acting in violation of the express provisions of Section 1001(d) of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, and of Section 322(d) of the Revenue Act of 1932; that prior to its coming into this Court, petitioner has exhausted all the adequate remedies open to it to obtain the refund of said amounts justly due it; that

petitioner's requests for refund of the same have been unlawfully and illegally denied; and that there is no other course open to petitioner but to petition this Court.

Wherefore, the premises being considered, petitioner prays:

1. That a rule may issue directing the respondent to appear before this Court and show cause, if any there be, why a writ of mandamus should not be issued commanding and directing respondent to refund to petitioner, without set-off of any kind or in any amount, the amounts so determined by the Board of Tax Appeals to be due petitioner, together with interest thereon as provided by law.

2. That a writ of mandamus may issue to said respondent commanding and directing him to refund to petitioner $65,138.14, being amounts so paid by petitioner to respondent on February 9, 1932, with respect to the years 1924 and 1925, and to refund to petitioner $4,376.39 with respect to the year 1928, all with interest thereon, as allowed by law.

3. For such other and further relief as the nature
7 of the petition may require.

GIRARD TRUST COMPANY,
Trustee under Will of John A. Brown, Jr., Deceased,
By G. L. BISHOP, JR.,
Vice Prest.

H. C. KILPATRICK,
Attorney for Petitioner.
CHARLES MYERS,
Of Counsel.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

G. L. Bishop, Jr., being first duly sworn, deposes and says that he is Vice-President of Girard Trust Company, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that he is authorized by said petitioner to verify this petition; and that the matter and facts stated therein are true to the best of his knowledge, information and belief.

G. L. BISHOP, JR.

Subscribed and sworn to before me this the 8th day of February, 1935.

[SEAL.] G. W. HORNSBY,
Notary Public.

(My commissionexpires December 7, 1935.)

8 EXHIBIT A.

I, John A. Brown, Jr., of Newtown Township, Delaware County, State of Pennsylvania, do hereby make, publish and declare my last Will and Testament in manner following:

First. I direct all my just debts to be paid as soon after my decease as they reasonably can.

Second. I give and devise my house and lot of ground thereto belonging, being Number 224 South Nineteenth Street in the City of Philadelphia, and containing thirty-three feet in front by one hundred and forty-five feet in depth, my stable Number 2038 Rittenhouse Street, in said City, and my country house, stables and other buildings with the grounds thereto belonging, being about one hundred and fifty acres, more or less, situate in Newtown Township, Delaware County, Pennsylvania, to my wife Harriet Etting Brown; to have and hold both the said premises situate in the City of Philadelphia and in Newtown Township as aforesaid, for and during her natural life. At her death the said premises in the City of Philadelphia and in Newtown Township shall, if owned by my estate, fall into, form, be and become part of my residuary estate. I direct that all taxes, charges, rates, assessments, insurance premiums and cost of repairs to said houses and premises, or any or either thereof, shall be paid by my Trustees out of the balance of the income of my residuary estate after the payment of the annuity to my wife as hereinafter provided.

Third. I give and bequeath unto my wife absolutely all my furniture, plate, plated ware, pictures and household goods, and furniture of every description, and my horses, carriages, harness, motor cars, and my clothing, jewelry and similar personal effects, farming utensils and appliances and cattle in or about and pertaining to my said houses and premises in the City of Philadelphia and in

Newtown Township. I direct that no inventory or
9 appraisement shall be made of any of said articles and that all taxes, if any thereon, shall be paid by my Trustee from my residuary estate.

Fourth. All the rest, residue and remainder of my estate, real and personal, except the real estate situate in the State of New York for which provision is hereinafter specifically made, I give, devise and bequeath to Girard Trust Company and its successors In Trust, nevertheless, for the following uses and purposes:

To retain existing investments or to sell the same and make reinvestments as hereinafter provided; to invest and reinvest in mortgages which are a first lien on real estate in Pennsylvania and New York, in the first mortgage bonds of dividend paying railroads, in car trust or equipment trust certificates of dividend paying railroads, in United States loans, in the loans of the State of Pennsylvania and the State of New York, in loans of municipalities, township, school districts and similar public divisions in the State of Pennsylvania, and in ground rents in the City of Philadelphia; to collect, receive and take the rents, issues, income and interest arising from the same and after the payment of all proper commissions and charges, to pay to my said wife Harriet Etting Brown, if she shall survive me and during her lifetime, in lieu, with the life estate in my said houses as hereinbefore provided, of all dower in my estate, the sum of Ten thousand Dollars ($10,000) per month, the first payment to be made on the first day of the month succeeding my death, free and clear of all taxes, which shall be paid by my said Trustee out of the remaining income, and to pay the balance of said income to and among my children by my said wife Harriet Etting Brown, or to and among the child or children of any deceased child, such child or children taking only their parents' share, in equal shares during the lifetime of my said wife. Upon the death of my said wife, to pay the entire income from my said estate in equal shares to and among my child
10 or children by her living at the death of my said wife, or to and among the child or children of any deceased child, such child or children taking their parents' share, until the youngest child of a deceased child living at the date of my death shall reach the age of twenty-one years, and thereupon to pay over the principal of my said

estate in equal parts or shares to and among my child or children by my said wife, then living, and to and among the child or children of any deceased child of mine, as aforesaid, such child or children to take their parents' share.

If there shall be no children of mine by my said wife living at the date of my death or born thereafter, then In Trust, to pay the balance of the income during the lifetime of my said wife to Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, children of my sister Isabel Brown Coxe, and to Alexander Brown and Rosalie Brown Dolan, children of my brother Neilson Brown, in the same proportions and under the same trusts and uses as provided hereinafter for the payment to them of the income from my estate after the death of my wife, she leaving surviving her no child or children of mine by her, or child or children of a deceased child as aforesaid.

And in trust, upon and after the death of my said wife Harriet Etting Brown, without leaving surviving her a child or children of mine by her, or a child or children or a deceased child of mine by her, to pay the net income from my estate, real and personal, in the following manner: One-half thereof in equal shares to and among Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, the children of my sister, Isabel Brown Coxe, now deceased, for and during their respective natural lives, and upon the death of each or any one of the said Henry B. Coxe, Alexander Brown Coxe or Charles E. Coxe before or after my death, to pay one-third of one-half of the net income of my residuary estate to the child or children, in equal
11 shares, of the one of my said nephews so dying, who were living at the date of my death, for their natural lives, and upon the death of each of said child or children, to pay the share of the said income of the child so dying to his or her child or children until such child or the eldest of such children shall reach the age of twenty-one years, and thereupon to pay over to each of such children a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children as herein provided; and as to any child or children of any one of my said nephews so dying, born after my death, to pay to such child or children his or her or

their equal shares in the said one-half of one-third of the income of my residuary estate, with the child or children living at my death as aforesaid, until such child or the eldest of such children born after my death as aforesaid, shall reach the age of twenty-one years, and thereupon to pay to such child and to such children born after my death as aforesaid, a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children as herein provided. If any of my said nephews shall die without leaving a child or children surviving him, or the child or children of any deceased child surviving him, In Trust, to pay the income of the one so dying in equal shares to the survivors or to the survivor of such nephew, or to the child or children of a deceased nephew, such child or children taking the parent's share, upon the same uses and trusts as such nephew, or such child or children of a deceased nephew, take- under the provisions of this Will; or if any one of my said nephews shall die leaving a child or children surviving him and there shall be a failure of issue of such child or children, or, such child or children having issue, such issue shall die before becoming
entitled to the principal share of my estate to which
12 it and they shall be entitled under the provision of
this Will, then In Trust, to pay the income and distribute the principal of the share of such child or children or such issue, to the same person or persons and upon the same uses and trusts as herein provided for the child or children, or their issue, of my other said nephews.

And in trust, to pay one-half of the net income of my residuary estate in equal shares to my nephew, Alexander Brown and my niece, Rosalie Brown Dolan, children of my brother, Neilson Brown, now deceased, for and during their respective natural lives, and upon the death of said Alexander Brown and or of the said Rosalie Brown Dolan, to pay one-half of one-half of the net income of my residuary estate to the child or children of either the said Alexander Brown or Rosalie Brown Dolan so dying, who were living at the date of my death, for their natural lives, and upon the death of each of said child or children to pay the share of the said income of the child so dying to his or her child or children until such child or the eldest of such children shall reach the age of twenty-one years, and thereupon to

pay over to each of such children a principal part of my residuary estate representing their respective interests therein, as determined by the share of the income theretofore payable to such child or children, as above provided; and as to any child or children of either of my said nephew, Alexander Brown, or my said niece, Rosalie Brown Dolan, so dying, born after my death, to pay to such child or children his, her or their equal shares in the said one-half of one-half of the net income of my residuary estate, with the child or children living at my death as aforesaid, until such child or the eldest of such children born after my death as aforesaid shall reach the age of twenty-one years, and thereupon to pay to such child and to such children born after my death as aforesaid, a principal part of my residuary estate representing their respective interests therein, as determined by the shares of the income theretofore payable to such child or children as herein provided. If my said nephew, Alexander Brown and or my said niece, Rosalie Brown Dolan, shall die without leaving any child or children surviving him or her, or the child or children of any deceased child surviving him or her, In Trust, to pay the income of the one so dying to the survivor of said Alexander Brown or said Rosalie Brown Dolan, or to the child or children of said Alexander Brown or Rosalie Brown Dolan deceased, such child or children taking their parents' share, upon the same uses and trusts as said Alexander Brown, or said Rosalie Brown Dolan, or the child or children of either thereof, take under the provisions of this Will; or if either my said nephew Alexander Brown, or my said niece Rosalie Brown Dolan, shall die leaving a child or children surviving him or her and there shall be a failure of issue of such child or children, or, such child or children having issue, said issue shall die before becoming entitled to the principal share of my estate to which it and they shall be entitled under this Will, then In Trust, to pay the income and distribute the principal of the share of such issue to the same person or persons and upon the same uses and trusts as herein provided for the child or children, or their issue, of the said Alexander Brown or Rosalie Brown Dolan respectively.

And in trust further, if no one of my said nephews, Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe shall leave surviving him a child or children, or a

child or children of a deceased child as aforesaid, or leaving such child or children there shall be a failure of issue thereof, then upon the death of the last survivor of my said nephews Henry B. Coxe, Alexander Brown Coxe and Charles E. Coxe, to pay the income and distribute the principal of the said one-half of my residuary estate to the same person or persons and upon the same uses and trusts as herein provided for the other one-half of the income and principal of my residuary estate, and likewise

14 In Trust, if neither my said nephew Alexander Brown or my said niece Rosalie Brown Dolan shall leave surviving him or her a child or children, or the child or children of a deceased child as aforesaid, or leaving such child or children there shall be a failure of issue thereof, to pay the income of and distribute the principal of one-half of my residuary estate to the same person or persons and upon the same uses and trusts herein provided for the each one-half of my residuary estate.

Fifth. I direct that all rents that have accrued prior to my decease, but have not been collected, and all interest or return on any investment that has accrued up to the time of my decease, shall be taken and treated as income and not as principal, and disposed of as I have directed in regard to income.

Sixth. I direct my Trustee hereinafter named to sell all real estate which shall be acquired by foreclosure of mortgages held by me at the time of my death or by my estate thereafter, as soon after the acquisition thereof as may be convenient and, in the judgment of my Executors or my said Trustee, shall not be detrimental to the interests of my estate, and to hold the proceeds of such sales as a part of my residuary estate.

Seventh. I give, devise and bequeath unto Girard Trust Company and its successors, all my real estate situate in the State of New York of which I shall die seized, In Trust, to receive the rents and profits thereof and during the lifetime of my said wife, unless the said real estate shall be sooner sold, to apply them to the payment of the annuity to my said wife and the distribution of income to my children or my nephews and nieces, as herein above provided, and upon my death or at any time during the life of my said wife and upon her death after my death, to sell the said real estate and to receive and hold the proceeds thereof

as part of my residuary estate, upon the uses and trusts and for the purposes hereinbefore specifically provided in regard thereto.

15 Eighth. If my said wife, Harriet Etting Brown shall not desire to live in my said house in the City of Philadelphia or in my said house in Newtown Township, or to use the said stable in Philadelphia, then with her assent in writing, they or any of said premises may be leased by my said Trustee or sold by it as it shall, with the consent of my said wife, determine. If they shall be leased, the rentals thereof shall be paid by my said Trustee to my said wife, Harriet Etting Brown, during her life-time. If they shall be sold, the proceeds shall be invested by my said Trustee as part of my residuary estate and the income therefrom paid to my said wife, or such part of the proceeds as my said wife may desire to be so applied, shall be expended in the purchase or construction of another house or houses and premises for her use during her life, and such houses or premises shall be held in trust for the use and benefit of my said wife during her life, and thereafter upon the same uses and trusts as hereinabove provided as to my residuary estate, and the balance of said proceeds shall be invested and the income thereof paid as above provided. If the said premises, or either of them, shall be injured or destroyed by fire or otherwise, they may be repaired and restored by my Trustee by the application of moneys out of my residuary estate to the extent that the insurance thereon shall be insufficient.

For the purpose of carrying out the foregoing provisions of my Will, I give to my Executors hereafter appointed and to my said Trustee and its successors, power to sell all or any part of my real estate (subject to the consent of my said wife as to my said premises in Philadelphia and in Newtown Township and any others which may be purchased for her use as aforesaid) either at public or private sale, for such prices as they may see fit, and to grant and convey the same to the purchaser thereof in fee simple, or any less estate, free and discharged of all trusts of this my Will, without liability on the part of such purchaser or pur-

16 chasers to see to the application of the purchase money.

Ninth. My Executors shall not be bound to file any inventory or appraisement of my estate, but may do so if in

their judgment such inventory and appraisement should be filed. I give to my Executors hereinafter named and to my said Trustee, and its successors severally, authority and power from time to time, in the exercise of a sound discretion, to take and pay for out of my residuary estate any allotments of bonds, stocks or securities made by corporations in which my estate shall hold bonds, stocks or other securities, to become parties to any plan of reorganization of such corporations by assenting thereto, and accepting securities to be issued thereunder, and generally to do all things necessary in the exercise of their judgment for the protection of my estate and the investments thereof, in full exercise of the powers as holders of said bonds, stocks or other securities.

Tenth. I nominate and appoint Girard Trust Company and Henry B. Coxe, to be the Executors of this my Will and Testament, hereby revoking any other Wills or Codicils by me at any time heretofore made, and I declare this only to be and containing my last Will and Testament. Should my said nephew, Henry B. Coxe not survive me, or decline or be unable to serve as Executor, then I direct that Girard Trust Company shall be the sole Executor of this my Will.

In witness whereof I, the said John A. Brown, Jr., have to this my last Will and Testament, contained on this and the nine preceding pages, set my hand and seal, to wit: my hand to the bottom of each of the nine preceding pages, and my hand and seal to this last page, this 14th day of April, in the year of our Lord One Thousand Nine Hundred and Thirteen.

17 JOHN A. BROWN, JR. [SEAL.]

Signed, sealed, published and declared by John A. Brown, Jr., the Testator above named, as and for his last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as attesting witness.

JOHN HAMPTON BARNES.
SPENCER ERVIN.
JOHN CARBURY.

18 I, John A. Brown, Jr., of Newtown Township, Delaware County, State of Pennsylvania, do hereby make and publish this as and for a Codicil to my last Will

and Testament dated the Fourteenth day of April, A. D. 1913:

I desire to increase the amount of net income to be paid to my wife, Harriet Etting Brown, from my estate, as directed to be paid under my said Will, and to that end and in lieu of the payment of Ten Thousand Dollars ($10,000) per month to be paid to her as herein provided, I authorize and direct the Girard Trust Company, Trustee of my residuary estate and Trustee with respect to all my real estate situated in the State of New York, during the lifetime of my said wife to apply the income of all my estate, real and personal, including therein the income from my New York real estate, as follows:

To the payment of all taxes, charges, assessments, rates, insurance upon and cost of repairs of my real estate, and upon any substituted therefor, as provided in my Will; to the payment of all taxes upon the principal of or income from my estate payable or deductible by my Trustee or otherwise chargeable against the said principal or income thereof; to the payment of the commissions of the Trustee and costs and expenses of the management of my trust estate; to the reimbursement of any taxes which my said wife shall be required to pay or shall pay upon the income paid to and received by her from my estate;

And after making all said payments or provision therefor, to pay the net income from all of my estate, real and personal arising after the date of my death, up to but not exceeding the sum of Two hundred thousand Dollars ($200,000) per annum, to my said wife, Harriet Etting Brown, for and during the term of her natural life, in quarterly payments or in payments made at shorter intervals and in appropriate and convenient divisional amounts.

I further dire-t my Trustee, during the lifetime of my said wife, to pay the balance and remainder of the
19 annual net income from my estate, if any, after all of the said payments have been made and provided for, and after the said amount of Two hundred thousand Dollars ($200,000) has been paid to my said wife, to and among the persons and in the manner directed in my said Will, and after the death of my said wife to pay the entire net income from my estate as provided and directed in my said Will in that event, and to hold the principal of my

estate upon the uses and subject to the provisions of my said Will.

Except as herein specificially altered and modified I hereby ratify, confirm and republish my said Will.

In witness whereof, I have hereunto set my hand and seal this 10th day of February, A. D. One thousand nine hundred and nineteen (1919).

JOHN A. BROWN, JR. [SEAL.]

Signed, sealed, published and declared by John A. Brown, Jr., the Testator above named, as and for a Codicil to his last Will and Testament, in the presence of us, who, in his presence and by his express direction, have hereunto subscribed our names as attesting witnesses in the presence of each other.

JOHN HAMPTON BARNES.
HELEN GILLINGHAM.
FRANCIS B. BIDDLE.

20 *Rule to Show Cause.*

Issued February 20, 1935.

* * * * * * *

Upon consideration of the petition of Girard Trust Company, Trustee under the will of John A. Brown, Jr., deceased, filed in the above entitled cause on the 20th day of February, 1935, it is by the Court this 20th day of February, 1935,

Ordered, that the respondent, Guy T. Helvering, Commissioner of Internal Revenue of the United States, appear in this Court at ten o'clock a. m., on the 6th day of March, 1935, and show cause, if any he have, why the prayer of said petitioner should not be granted and a writ of mandamus issued against him as therein prayed; provided, however, a copy of this order be served upon said respondent on or before the 21st day of February, 1935.

By the Court. O. R. LUHRING,
Justice.

Marshal's Return.

Served a copy of the above rule on the above named Guy T. Helvering, Commissioner by serving his assistant Wright Matthews 2/20/35 personally.

JOHN B. COLPOYS,
U. S. Marshal in and for the Dist. of Columbia,
By ELMER GRAVES,
Deputy U. S. Marshal.
K.

21 *Answer of Respondent.*

Filed April 22, 1935.

* * * * * * *

Now comes Guy T. Helvering, Commissioner of Internal Revenue, and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the petition filed herein, and to the jurisdiction of the court in the premises, and relying on the same as if motion to dismiss had been interposed, nevertheless files this, his answer to so much of such parts of the said petition and the rule to show cause issued herein as he is advised it is material or necessary for him to make answer unto, and says:

(1) Respondent admits the allegations of the first paragraph of the petition.

(2) Respondent for answer to the second paragraph of the petition admits that he is Commissioner of Internal Revenue of the United States, that his authority is prescribed by law, and that he is sued in his official capacity as such Commissioner of Internal Revenue. Respondent avers, however, that as to the allegations of power and duty attributed to him in the second paragraph of the petition, the same are conclusions of law which he is not required to make answer unto.

22 (3) Respondent admits the allegations of the third paragraph of the petition.

(4) Respondent admits the allegations of the fourth paragraph of the petition.

(5) Respondent admits the allegations of the fifth paragraph of the petition.

(6) Respondent admits the allegations of the sixth paragraph of the petition.

(7) Respondent for answer to the allegations of the seventh paragraph admits all the allegations therein except that respondent avers that the petitioner has stated conclusions in its allegations as to the order of the Circuit Court of Appeals for the Third Circuit, requiring neither admission nor denial thereof by respondent, and respondent affirmatively avers that the said Circuit Court of Appeals, under date of April 26, 1933, entered its order reading in words as follows:

It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this case be, and the same is hereby reversed.

(8) Respondent for answer to the allegations in the eighth paragraph of the petition admits the same except that respondent affirmatively alleges that the taxes assessed against the petitioner, as alleged, together with interest thereon, were paid February 10, 1932, to the Collector of Internal Revenue for the First District, Philadelphia, Pennsylvania, and denies that the same were paid February 9, 1932, as alleged.

(9) Respondent for answer to the allegations of the ninth paragraph of the petition avers that the petitioner has stated conclusions requiring neither admission nor denial by the respondent, and respondent affirmatively avers that the Board of Tax Appeals, under date of July 7, 1934, entered its decision reading in the words and figures following:

23 Whereas, the above entitled proceeding was remanded by the Circuit Court of Appeals for the Third Circuit for further proceedings, and

Whereas, counsel for both parties have filed proposed recomputations in accordance with the opinion and mandate of said court, which recomputations are in agreement, now therefore, in accordance with said recomputations, it is

Ordered and decided that there are no deficiencies for the years 1924 and 1925 and that there are overpayments for said years in the respective amounts of $30,278.28 and $16,560.85.

(10) Respondent for answer to the allegations in the tenth paragraph of the petition admits the same except the

respondent avers that the petitioner has stated conclusions in its allegations as to the decision entered by the Board of Tax Appeals, under date of September 29, 1934, requiring neither admission nor denial by respondent, and respondent affirmatively avers that the Board of Tax Appeals under date of September 29, 1934, entered its decision reading in the words and figures following:

Under written stipulation signed by counsel for the parties in the above entitled proceeding and filed with the Board on September 20, 1934, it is

Ordered and decided: That the petition herein respecting income tax liability for the year 1928 was filed with the Board on March 6, 1931; that no claim for refund has been filed; that within two years of the filing of the petition, tax was paid in the total amount of $9,195.75; that the true tax liability of the petitioner is $4,819.36, and therefore, according to the provisions of Section 504 (a), Title III, of the Revenue Act of 1934, there is an overpayment of $4,376.59 for the year 1928.

Respondent further admits that no petition for review of said decision was filed, and that the decision became final on December 29, 1934.

24 (11) Respondent for answer to the allegations in the eleventh paragraph of the petition denies the same for reasons more specifically hereinafter set forth in paragraph (e)

(12) Respondent for answer to the allegations in the twelfth paragraph of the petition denies that any amounts were paid by petitioner pending court review, but avers that the same constituted taxes duly assessed and collected, as alleged by paragraph 8 of the petition and admitted herein, and respondent admits that petitioner has demanded the refund of the said amounts assessed and paid, as aforesaid, with this limitation on his admission and to this extent: that petitioner, under date of January 26, 1934, filed with the Collector of Internal Revenue for the First Internal Revenue District at Philadelphia, Pennsylvania, its claim for refund in the amount of $42,732.19, representing tax and interest assessed against and paid by petitioner for the calendar year 1924, as alleged in paragraphs 7 and 8 of the petition and admitted herein, and its claim for refund in the amount of $22,405.95, representing tax and interest

assessed against and paid by petitioner for the calendar year 1925, as alleged in paragraphs 7 and 8 of the petition and admitted herein, and respondent admits that the said amounts, or any part thereof, have not been refunded to petitioner but respondent denies that he has refused to refund said amounts or any part thereof. Respondent for further answer to the allegations in the twelfth paragraph of the petition, with reference to the overpayment found by the Board for the year 1928 as alleged in paragraph 10 of the petition, and admitted herein, denies that any formal demand for refund of the same, or any part thereof, has been made of respondent by petitioner at any time; respondent avers that petitioner, by counsel, has orally and by informal correspondence requested the refund of the said overpayment, admits that the same, or any part thereof, has not been refunded to the petitioner but respondent denies that he has refused to refund said overpayment or any part thereof.

Respondent for answer to the second paragraph of the twelfth paragraph of the petition, the same being the alleged grounds of the respondent for his alleged refusal, avers that the same represent conclusions of the petitioner and require neither admission nor denial by respondent but if the same be deemed material respondent denies them and demands strict proof thereof, and further respondent avers that the same are immaterial, incompetent and irrelevant and respondent respectfully moves the Court that the same be stricken from the petition.

(13) Respondent for answer to the allegations in the thirteenth paragraph of the petition avers that the same represent conclusions of the petitioner and require neither admission nor denial by respondent, but if the same may be deemed material respondent denies them, and specifically denies that, prior to its coming into this Court, or at this time, petitioner had, or has, exhausted all the adequate remedies open to it to obtain the refunds alleged to be justly due it, and specifically denies that petitioner's requests for refund of any amounts alleged to be due it have been unlawfully and illegally denied or otherwise denied; and denies that there is no other course open to petitioner but to petition this Court, and respondent avers that petitioner has not formally requested any refunds other than by the claims for refund, filed as aforesaid, and set out in paragraph 12

herein, and other than, by counsel, by oral and informal written request.

Respondent for Further Answer to the petition filed herein avers:

(a) That this Court is without jurisdiction in this action for the reasons:

(1) That the determination by the respondent to allow or to reject a claim for refund involves the exercise of his discretition.

(2) That the determination by the respondent to credit or refund or to disallow the overpayments found by the Board of Tax Appeals in accordance with the Board's decision entered as averred in paragraph 9 herein involves the exercise of his discretion.

(3) That the determination by the respondent to credit or refund the overpayment found by the Board of Tax Appeals in accordance with the Board's decision as averred in paragraph 10 herein involves the exercise of his discretion.

26 (4) That petitioner has an adequate and complete remedy at law, if any it be entitled to, in accordance with the statutes in such cases made and provided for, and that prior to, and at the time of bringing this action, plaintiff had, and at this time now has, such an adequate and complete remedy.

(5) That the petition herein is premature and untimely, and respondent respectfully moves the court to dismiss the same, for the reasons that respondent has not taken any final action with regard to the said claims for refund, filed for the years 1924 and 1925 as aforesaid, neither rejecting nor allowing the same, and that the same are still under consideration by him; and that more than six months have elapsed since the filing of the same and had elapsed at the time this action was filed; that he has not taken any final action with regard to the overpayments for the years 1924 and 1925 found by the Board of Tax Appeals in its decision entered July 7, 1934, as averred by paragraph 9, herein, neither crediting nor refunding the same nor refusing to credit or refund the same, and that the same at the time of the filing of the petition herein were, and still are, under consideration by him; that he has not taken any final action with regard to the overpayment for the year 1923 found

by the Board of Tax Appeals in its decision entered September 9, 1934, as averred in paragraph 10 herein, neither crediting nor refunding the same nor refusing to credit or refund the same, and that the same at the time of the filing of the petition herein was and still is under consideration by him; and with respect to all these matters, aforesaid, respondent avers that he has not acted finally in any regard.

(b) Further answering the petition the respondent avers that he has been, was at the time of the filing of the petition, and is now, considering the claims for refund, filed as aforesaid by petitioner, that he has not allowed the same nor any part thereof, and that the same, nor any part thereof, have not been rejected nor has notice of their rejection, or any part thereof, being given to petitioner, and that more than six months had expired since the filing of the same at the time of the filing of this petition.

27 (c) Further answering the petition the respondent avers that, at the time of the filing of this action he had notice of the decision of the Board of Tax Appeals entered July 7, 1934, as averred by paragraph 9 herein, that the same had been, was at the time of the filing of the petition herein, and is now, under consideration by him; that he has not credited or refunded the overpayments, or any part thereof, found by the said decision and that he has not refused to credit or refund the said overpayments, or any part thereof, and that no formal request or demand has been made of him by petitioner to refund or credit the same and that he has not failed or refused to act in any particular in the manner and form prescribed by law. Respondent avers that any requests or demands made of him were, by counsel, by oral and/or informal written correspondence.

(d) Further answering the petition the respondent avers that at the time of the filing of this action he had notice of the decision of the Board of Tax Appeals as averred by paragraph 10 herein, that the same had been, was at the time of the filing of the petition herein, and is now, under consideration by him; that he has not credited or refunded the overpayment, or any part thereof, found by the said decision and that he has not refused to credit or refund the said overpayment, or any part thereof, and that no formal request or demand has been made of him by peti-

tioner to credit or refund the same and that he has not failed or refused to act in any particular in the manner and form prescribed by law. Respondent avers that any requests or demands made of him were, by counsel, by oral and/or informal written correspondence.

(e) Further answering the petition the respondent avers:

(1) That the petitioner is trustee under the will of John A. Brown, Jr., deceased, as alleged in paragraphs 1 and 3 of the petition and admitted herein.

(2) That Harriet Etting Brown, widow of the decedent John A. Brown, Jr., is the sole beneficiary of the said trust created by the said will.

28 (3) That, pursuant to the provisions of the said will, the said Harriet Etting Brown elected to receive and did receive income from the said trust during the following calendar years in the following amounts and paid taxes thereon in the following amounts:

Year	Income	Taxes
1924	$129,197.72	$24,895.72
1925	110,782.37	11,923.09
1926	115,682.41	12,981.33
1927	107,147.48	10,990.66

That the said taxes were paid to the Collector of Internal Revenue for the First Internal Revenue District Philadelphia, Pennsylvania, and were by him duly covered into the Treasury of the United States.

(4) That the said Harriet Etting Brown, on the dates set out below, filed claims for refund of the taxes paid, as aforesaid, for the said years in the following amounts:

Date.	Year.	Amount.
March 14, 1929	1924	$23,578.65
March 14, 1929	1925	11,883.32
August 5, 1929	1926	12,957.95
January 22, 1931	1927	10,966.80

That the reason advanced by the said Harriet Etting Brown as a basis for her said claims was, that, the income received by her from the said trust, as aforesaid, was not taxable to her for the reason that it represented the return of her dower and/or statutory rights relinquished by her when she elected to take under the said will.

(5) That the then Commissioner of Internal Revenue, and/or his agents, considered the said claims and determined to allow the same, for the reason advanced therein, as aforesaid, and pursuant to that determination caused his certificates of overassessment to be issued, and overassessments scheduled pursuant thereto, and in ac-
29 cordance therewith, refunds of taxes, with interest thereon, in the following amounts, for the following years were made to the said Harriet Etting Brown:

Year	Tax Refund	Interest	Total
1924	$24,807.99	$8,762.62	$33,570.61
1925	11,903.18	3,626.66	15,529.84
1926	12,958.15	3,173.77	16,131.92
1927	10,966.80	2,025.68	12,992.48

And the said amounts were paid September 17, 1931, out of moneys in the Treasury of the United States.

(6) That the said Harriet Etting Brown, during the calendar year 1928 received income from the said trust in the amount of $101,948.34 that she filed her individual income tax return for the said year but failed to include in the said return as subject to tax the said income, or any part thereof, and failed to pay any tax thereon and that the tax due and payable thereon by the said Harriet Etting Brown was not less than $4,376.39.

(7) That the then Commissioner of Internal Revenue, and/or his agents, examined the said return filed as aforesaid for the calendar year 1928 and determined to accept the same notwithstanding that the same did not have included therein as subject to tax the said income received as aforesaid, and notwithstanding that no tax was paid on the said income by the said Harriet Etting Brown.

(8) That the said determination of the then Commissioner of Internal Revenue, and/or his agents, to allow the said claims for refund, as aforesaid, and to accept the said return as filed, as aforesaid, was erroneous and mistaken and by reason thereof the said refunds were erroneously, mistakenly and illegally made, and the said money paid out to the said Harriet Etting Brown was erroneously, mistakenly and illegally paid out of the Treasury of the United States, and although receiving the said money, erroneously, mistakenly, and illegally paid out, as aforesaid, in
30 good faith and without intent to defraud the United

States, the said Harriet Etting Brown still retains the same without just right thereto and wholly fails, neglects and refuses to repay the same or any part thereof; and the said income for the calendar year 1928 received by the said Harriet Etting Brown, as aforesaid, has not been taxed in the amount of tax properly due and payable thereon to wit: $4,376.39, and although the said Harriet Etting Brown failed, neglected and refused to pay the said taxes properly due and owing for the calendar year 1928, as aforesaid, in good faith and without intent to defraud the United States, the same are still due and owing the said Harriet Etting Brown still wholly fails, neglects and refuses to pay the same or any part thereof.

(9) That the petitioner herein and the said Harriet Etting Brown are the same parties in interest, that the petition herein is for the benefit of the said Harriet Etting Brown, that any relief prayed herein and granted will inure to the sole benefit of the said Harriet Etting Brown to her unjust enrichment to the extent that the said Harriet Etting Brown is now justly indebted to the United States, and the said income received by her, as aforesaid, will be untaxed, and the respondent alleges that in equity and good conscience the respondent should not be commanded and directed to refund to petitioner the said amounts herein prayed for, or any amounts in excess of the amounts now justly due and owing from the said Harriet Etting.

(f) That the bill or complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for.

Wherefore, having fully answered the petition filed herein and the rule to show cause, respondent prays that the petition be dismissed and the rule to show cause discharged with costs.

GUY T. HELVERING,
Commissioner of Internal Revenue.

LESLIE C. GARNETT,
United States Attorney.
T. G. CARNEY,
Special Assistant to the Attorney General.
H. L. UNDERWOOD,
Assistant United States Attorney.

31 DISTRICT OF COLUMBIA, *ss:*

Guy T. Helvering, Commissioner of Internal Revenue, being first duly sworn deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge are true; and that those set forth upon his information and belief are believed to be true.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Subscribed and sworn to before me this 20 day of April, A. D. 1935.

[SEAL.] MARCELETTE M. TAYLOR,
Notary Public.

My Com. expires Apr. 1, 1940.

32 *Demurrer to Answer.*

Filed April 26, 1935.

* * * * * * *

Now comes the petitioner and demurs to the respondent's answer herein and says that it is bad in substance, for the following reasons:

1. The answer admits all of the material allegations of the petition, and relies for affirmative defense only upon conclusions of law and irrelevant matter.

2. The answer is vague, indefinite, conflicting, evasive and insufficient in law, in the following respects:

(a) While denying the allegations of paragraph 11, the denial is equivocal and evasive, in that it is limited by the words "for reasons more specifically set forth in paragraph (e)", and in said paragraph (e) no facts are stated which show or attempt to show, nor is it alleged, that taxes are due from petitioner for any year or period.

33 (b) While denying (in paragraph 12 thereof) that respondent has "refused" to refund the overpayments admittedly determined by the Board of Tax Appeals, the answer admits that respondent has not refunded the same, and does not state any facts in explanation of or as justification for respondent's delay and failure to refund said overpayments as required by law.

(c) While denying (in paragraphs 12 and 13) that petitioner has made any "formal demand" for the refund of the overpayment determined by said Board for 1928, the answer admits that petitioner has orally and by correspondence requested the refund of said overpayment, thereby implying, but not stating any facts tending to show, that such requests were not sufficient in law to entitle petitioner to the relief prayed for.

(d) While denying (in paragraph 12 thereof) the petitioner's statement of respondent's alleged grounds for refusal to act, and asking that the same be stricken out as immaterial, incompetent and irrelevant, the answer (in paragraph (e) thereof) sets up substantially the same grounds as a defense to petitioner's demand that the refunds be paid.

(e) While averring (in paragraph (a) (5) thereof) that the respondent "has not taken any final action" with regard to petitioner's demands or with regard to the overpayments found by the said Board, and that "the same are still under consideration by him," the answer states no facts concerning respondent's failure to act thereon, and offers no explanation of such failure, but (in paragraph (e) thereof) insists that petitioner has no right to the refunds demanded.

33½ (f) While stating generally (in paragraphs (b), (e) and (d) thereof) that respondent has not yet decided whether he will refund the overpayments determined by said Board, the answer avers (in paragraph (e) thereof) that the refunding of such overpayments would be contrary to "equity and good conscience," thus indicating clearly respondent's decision that he will not refund such amounts.

3. The defense set out in paragraph (e) of the answer is bad in substance, in that:

(a) It is based entirely upon conclusions of law as to the effect of acts done by the respondent or his predecessor with reference to the tax liability of a person not a party to this proceeding.

(b) It fails to show the existence of any liability on the part of petitioner for the amounts alleged to be due from Harriet Etting Brown, and fails to show any right in the respondent to exact payment thereof from the petitioner.

(c) It fails to show that respondent has made any attempt to collect said alleged amounts from Harriet Etting Brown, and shows affirmatively that respondent made no such attempt, but, on the contrary, with full knowledge of all the facts, refunded to her taxes paid for certain years, and failed thereafter to proceed against her for the collection of the same within the statutory period authorized for such action, and the respondent failed to assess or collect the taxes alleged to be due by her for the year 1928 within the statutory period provided for such assessment and collection.

(d) It is a patent attempt to plead, as a set-off, demands against a third party, the collection of which is
34 barred by the statute of limitations.

(e) It is an attempt to credit overpayments due one taxpayer against deficiencies alleged to be due by another, which deficiencies are barred from assessment or collection by the statute of limitations, and such a credit would be void even if the deficiencies were due by the petitioner.

(f) It is an attempt to attack collaterally decisions of the Board of Tax Appeals, from which respondent did not appeal and which have long since become final; such decisions are binding upon respondent and may not be inquired into in this proceeding.

(g) It is argumentative and states no facts fixing or tending to fix any liability on petitioner for the alleged claims against Harriet Etting Brown.

4. The conclusions of law set forth in paragraphs (a) to (d) of said answer are not well taken in that:

(a) Where the Board of Tax Appeals has determined an overpayment by a taxpayer appealing to said Board, and the Board's decision has become final, the Commissioner of Internal Revenue is charged with the ministerial duty of crediting such overpayment against deficiencies due by said taxpayer for other years, and where there are no such deficiencies due, is charged with the ministerial duty of refunding the overpayment to the taxpayer. This duty does not involve the exercise of any discretion.

(b) Petitioner has no clear, adequate or complete remedy at law for securing the refund of the amounts determined as overpayments by the Board of Tax Appeals, and

the fact that petitioner might at the same time have
35 other rights with other remedies arising out of the same transaction is not a valid reason for denying the relief prayed for herein.

H. C. KILPATRICK,
Attorney for Petitioner.

CHARLES MYERS,
Of Counsel.

36 *Order.*

Filed December 12, 1935.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause issued thereunder, the answer of the respondent, and the demurrer thereto, and, after hearing counsel for the parties and upon consideration by the Court, it is this 12th day of December, A. D., 1935,

Adjudged and ordered: That the judgment of November 25, 1935, discharging the rule and dismissing the petition be and the same hereby is vacated and for nothing held; and that the demurrer to the answer be and the same hereby is overruled.

The petitioner electing to stand on its demurrer to the answer, it is further adjudged and ordered that the petition for mandamus in this cause be and the same hereby is dismissed with costs and the rule to show cause discharged.

By the Court.

JOSEPH W. COX,
Associate Justice.

Exceptions allowed to the overruling of the demurrer, the discharge of the rule to show cause, and the dismissal of the petition, and appeal noted in open Court by the petitioner, whereupon the undertaking for costs is hereby fixed in the sum of $100 with leave to deposit the sum of $50 with the Clerk in lieu thereof.

JOSEPH W. COX,
Justice.

No Objection as to Form:
H. C. KILPATRICK,
Attorney for Petitioner.

Memorandum.

December 13, 1935.—$50 deposit by Petitioner on appeal.

37 *Assignments of Error.*

Filed December 13, 1935.

* * * * * * *

Now comes the petitioner, by its attorney, H. C. Kilpatrick, and assigns as error in the above entitled cause the following:

1. The Court erred in holding the answer filed April 22, 1935, sufficient in law as a defense to the petition.
2. The Court erred in holding as a matter of law that the writ of mandamus should not issue, upon the facts alleged in the petition and admitted in the answer.
3. The Court erred in overruling petitioner's demurrer to the answer.
4. The Court erred in dismissing the petition and discharging the rule to show cause.

H. C. KILPATRICK,
Attorney for Petitioner.

Service of a copy of the foregoing Assignments of Error is acknowledged this 13th day of December, 1935.

H. L. UNDERWOOD,
Assistant United States Attorney,
For Respondent.

38 *Designation of Record.*

Filed December 13, 1935.

* * * * * * *

In appearing the record on appeal in the above entitled cause the Clerk will please include:

1. The petition for writ of mandamus filed February 20, 1935, together with the Exhibit marked A.
2. The rule to show cause issued February 20, 1935.
3. The Answer of Respondent filed April 22, 1935.
4. The Demurrer to answer filed April 26, 1935.

5. The judgment of the Court entered December 12th, 1935, with notation of appeal.

39 6. Note of deposit of $50.00 in lieu of cost bond.

7. The Assignments of Error.

8. This designation.

H. C. KILPATRICK,
Attorney for Petitioner.

Service of a copy of the foregoing Designation of Record is acknowledged this 13th day of December, 1935.

H. L. UNDERWOOD,
Assistant United States Attorney,
For Respondent.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 39, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 85102 at Law, wherein United States ex relatione, Girard Trust Company, Trustee under the will of John A. Brown, Jr., deceased, is Petitioner and Guy A. Helvering, Commissioner of Internal Revenue, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of December, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6618. U. S. ex rel. Girard Trust Co., etc., appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. United States Court of Appeals for the District of Columbia. Filed Jan. 2, 1936. Henry W. Hodges, Clerk.

[fol. 32] Wednesday, April 8th, A. D. 1936.

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

The argument in the above entitled cause was commenced by Mr. H. C. Kilpatrick, attorney for appellant. On motion, appellant allowed to file reply brief and handed to the Court. (Mr. Justice Robb not sitting.)

[fol. 33] Thursday, April 9th, A. D. 1936.

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

The argument in the above entitled cause was continued by Mr. H. C. Kilpatrick, attorney for appellant, and was continued by Mr. Thomas G. Carney, attorney for appellee, and was concluded by Mr. H. C. Kilpatrick, attorney for appellant. (Mr. Justice Robb not sitting.)

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6618

UNITED STATES ex Relatione, GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

Appeal from the Supreme Court of the District of Columbia

(Argued April 8 and 9, 1936. Decided May 18, 1936)

H. C. Kilpatrick, of Washington, D. C., for appellant.

Frank J. Wideman, Assistant Attorney General, Sewall Key, Robert H. Jackson, Norman D. Keller, and Thomas G. Carney, all of Washington, D. C., for appellee.

Before Martin, C. J., and Van Orsdel, Groner, and Stephens, JJ.

GRONER, J.:

John A. Brown, Jr., a citizen and resident of Pennsylvania, died testate in 1919. In his will he directed appellant, whom we shall call Girard, to take over his residuary estate in trust, collect the income and, after payment of certain expenses, to distribute the net to the extent of $200,000 annually to his widow, Harriet E. Brown. The widow elected, in compliance with the laws of Pennsylvania, to accept the income in lieu of her statutory share of the estate. Girard in the performance of the trust distributed to the widow the entire net income of the estate (which did not exceed $200,000 annually) for the years 1924 to 1930, inclusive; and, in computing the net taxable income of the estate for each of those years, it deducted the amount so distributed. (Section 219 (a) (2), Revenue Act of 1924 and corresponding sections of subsequent acts). The widow reported the amounts received by her as taxable income for the years 1924 to 1927, inclusive. She did not report as income the amounts received in 1928 and thereafter.

Between 1926 and 1928 three Circuit Courts of Appeals[1] held that income received by a widow, who had accepted such income in lieu of dower or statutory rights, was not taxable. "These cases held that by relinquishment of her rights, she came to occupy the position of the purchaser of an annuity." (290 U. S. 365, 369) The widow, relying on those decisions, filed claims[2] with the Commissioner for re- [fol. 35] fund of taxes which she had paid on the income distributed to her by Girard during the calendar years 1924 to 1927, inclusive. The Commissioner, also relying on the decisions, assessed[3] deficiencies—involving the same income distributed to the widow—against Girard for the years 1924 and 1925, on the ground that in computing the taxable net income of the trust the deduction by Girard of the amounts of income currently distributed to the widow had been improperly taken. (We assume the selection only of the years 1924-1925, was because of the approaching bar of the statute of limitations.) On appeal by Girard the Board sustained the Commissioner. The Commissioner, thereupon, September 17, 1931, paid the refund claimed by the widow, in an aggregate sum of approximately $78,000.00. However, in December following, Girard filed a petition for review of the decision of the Board as to it, but in lieu of bond paid the assessment against it with interest, in an aggregate amount of sixty-four thousand odd dollars. In April, 1933, the Court of Appeals in the Third Circuit[4] reversed the decision of the Board and held that the income payable to the widow was not taxable to Girard, and that the latter as trustee was authorized to deduct, as it had, the amount distributed to the widow, in making its return. Thereafter the Board, pursuant to the mandate of the court, entered its order July 7, 1934, finding that there were no deficiencies due from Girard for 1924 and 1925 but overpayments for such years in the aggregate amount of

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[1] Warner v. Walsh, 15 F. (2d) 367; United States v. Bolster, 26 F. (2d) 760; Allen v. Brandeis, 29 F. (2d) 363.

[2] (March, 1929; August, 1929; January, 1931).

[3] (March, 1929).

[4] See Butterworth Case, 63 F. (2d) 944, a companion case to the Girard appeal, the ruling in which resulted in a reversal of the Board in the Girard appeal.

its 1932 cash payment made, as we have seen, in lieu of bond,—plus a further and later payment of around four thousand dollars for the year 1928.

In December, 1933, the Supreme Court decided Helvering v. Butterworth, 290 U. S. 365, settling the conflict in the Circuits and holding that such income as is here involved was taxable against the widow. The result of this was to invalidate the refund made by the Commissioner to the widow. But the statute of limitations had, in September, 1933, run against recovery from the widow. In this state of the case, the Commissioner declined to refund to Girard the taxes erroneously collected from it; and the purpose of this suit is to require the Commissioner to make repayment in compliance with the decision of the Board, which long ago became final.

Laying aside for the time being the technical aspect of the question, and having regard only to the ultimate facts, the case is this: Mrs. Brown owes the United States a large amount of money for taxes. The statute of limitations has intervened, and the government cannot collect. On the other hand, her trustee, Girard, has paid to the United States a large amount of money for taxes for which it was not liable and which the Board has determined it is entitled to recover. The money, however, which it mistakenly paid belonged to Mrs. Brown and, if recovered, will be payable to her; so that if we shall order the lower court to issue the writ, the result will be to require the United States to pay over money which—while technically that of Girard—actually would go to Mrs. Brown. Obviously this is inequitable and ought not to be done unless required as a matter of law. In saying this much, we are not influenced [fol. 36] by the fact that the government is itself a party or that the subject we are dealing with is taxation. The result to be reached should be wholly uninfluenced by those facts. When the United States is properly a party in a litigation in its own courts, it occupies no different or better position than the humblest citizen. Overreaching on its part should be no more condoned than if practiced by an individual. We have said as much before. O'Laughlin v. Helvering, 81 F. (2d) 269. Impelled by these considerations, we proceed to a discussion of the case as made.

First. We are told by counsel for Girard that the Commissioner's duty to refund the overpayments is mandatory.

It is said that under Sec. 1001 of the Revenue Act of 1926, as amended by Sec. 603 of the Revenue Act of 1928, when the taxpayer loses his case before the Board and appeals to the court, he may either file a bond to stay collection or pay the amount claimed with the assurance that it will be returned to him if his appeal is successful—without the necessity of following the technical procedure of filing a claim as in the case of an ordinary taxpayer; in short, that payment under these circumstances is in the nature of a cash deposit in lieu of a surety bond. This is, we think, a correct statement of the law. Girard, having elected to pay rather than give a bond and having won its case in the Court of Appeals, was entitled when the decision of that Court became final—assuming that no other taxes were claimed and shown to be due—to a refund of the amount paid. This we said in McCarl v. Leland, 42 F. (2d) 346.

Undoubtedly, as we think, the decision of the court and the finding of the Board made mandatory the duty of the Commissioner to make the refund. Blair v. United States, 6 F. (2d) 484; James v. United States, 38 F. (2d) 140. We are, therefore, compelled to reject the proposition of the Commissioner that the statute authorizing refunds, under the circumstances we have mentioned, involves the exercise of judgment and discretion.

Second. We likewise find ourselves in disagreement with the Commissioner on the point that Girard has an adequate remedy at law. The suggestion that it could, by action in the Court of Claims or the District Court, enforce payment of its claim against the United States, is without force. It has a judgment or the equivalent of a judgment in the order of the Board of Tax Appeals—now final—and nothing it could obtain from either the Court of Claims or a District Court would be any more adequate or specific. The statute imposes on the Commissioner the duty of making payment in accordance with the final determination of the Board; and if, as we think, this duty is mandatory, the writ here prayed for is an appropriate remedy. See Houston v. Ormes, 252 U. S. 469, 472; Cole v. Helvering, 64 App. D. C. 35, 73 F. (2d) 852; McCarl v. Leland, 59 App. D. C. 362, 42 F. (2d) 346; Lucas v. Blackstone, 59 App. D. C. 389, 45 F. (2d) 291. And if it can be shown that it ought to issue, it is of no consequence that another remedy in another tribunal might produce the same result. Knox

County v. Aspinwall, 24 How. 376, 385; Blair v. United States, supra.

Third. This brings us to consider the only remaining ground of defense, which is that Girard, in equity and good conscience, is not entitled to the writ of mandamus. In support of this position, the Commissioner says that Girard and the widow are the same parties in interest and [fol. 37] should be treated, in a petition addressed to the conscience of the court, precisely as though the claim of the government against the widow was in fact a claim against Girard. In reaching the conclusion we have reached we shall assume, as Girard insists, that ordinarily a final decision of the Board of Tax Appeals that an overpayment has been made, is conclusive between the parties. Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 727. But we cannot assume, as is contended by Girard, that because the Commissioner—before the Board—failed to interpose the defense he now makes here, he is estopped to make it anywhere else. The erroneous refund to the widow was not a question within the Board's jurisdiction. Its statutory authority goes no farther than the ascertainment that the taxpayer has made an overpayment and is entitled to a refund. But we do not rest our decision on that point alone, but also, and more particularly, upon the ground that the writ of mandamus is not a writ of right, but is awarded only in the exercise of a sound judicial discretion and to compel the performance of an act which in equity and good conscience ought to be performed. Stated otherwise, the granting of the writ does not follow of necessity the showing of a legal right. United States v. Dern, 289 U. S. 352, 359. Even in such circumstances, it should be denied if the result will be to accomplish a moral wrong. "It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit." Duncan Townsite Co. v. Lane, 245 U. S. 308, 311. We may, therefore, grant Girard's contention that there is no statute permitting the overpayment of tax by one taxpayer to be set off against a tax due from another taxpayer, and we may lay aside altogether the disputed legal right of the United States to a counterclaim or recoupment. We may concede, further-

more, that the claim of the United States against the widow is not a claim for taxes but a claim for money erroneously paid and that there is nothing in the statute which permits the money due Girard to be credited against the taxes due by the widow,—and we may grant that, by reason of the running of the statute, the United States is wholly without a right to credit on the one hand or collect on the other. But we nevertheless get back to the single proposition whether, in a case like this, the court ought to exercise the power, which ordinarily it has, to compel the doing of the thing which Girard asks.

There is no charge of fraud or bad faith in this case. Both Mrs. Brown and the Commissioner acted on the natural and reasonable assumption that the law had been definitely settled by the decisions in the three Circuits. It is true that, when a different Court of Appeals decided that the Commissioner had erroneously assessed and collected the tax from Girard, there was still time in which to bring suit against Mrs. Brown to get back the money the Commissioner had mistakenly refunded to her. But in the meantime the conflict of view in the several Circuits had been submitted to the Supreme Court. The Commissioner, instead of acting on the safer side, awaited the decision of that Court. We do not think his inaction in this respect should be characterized as so gross as to create in this proceeding equities in favor of the widow or to destroy the [fol. 38] equities in favor of the United States. Mrs. Brown owes the United States a larger sum of money than the sum involved in the proceeding. If the latter sum had been paid to the Commissioner by her rather than by her trustee, clearly she would not now be able to recover it. But here it is insisted that, because the trustee is a distinct and separate entity and because the assessment was made against it and the payment made by it, a different conclusion must be reached, even though it be conceded the money paid by it belonged to Mrs. Brown.

Anderson v. Wilson, 289 U. S. 20, 26, 27, and Wynne v. Commissioner, 77 F. (2d) 473, recognize the principle that the trustee and beneficiary are not identical; and Hulburd v. Commissioner, 296 U. S. 300, 305, applies the rule that one taxpayer may not be assessed to pay the taxes of another. But in the view we take these principles have no relation to the situation here. Keeping in mind the prin-

ciple that mandamus should never issue to work a public or private mischief, the rule in those cases gives place to that other rule—which is just as firmly established—that when necessary to prevent a wrong or do a right, courts in order to do equity will look through the shadow to the substance.

In Luckenbach S. S. Co., Inc. v. W. R. Grace Co., 267 Fed. 676, 681, a subsidiary corporation wholly owned by its parent breached its contract to furnish cargo space for the carriage of nitrates between Chile and the United States. The subsidiary was financially unable to respond, and in a suit against the parent, the latter was held liable on the ground that the two corporations were, in the circumstances, substantially one. Judge Knapp said:

"For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form."

Under a different state of facts, but to the same end, the Supreme Court, in Chicago R. Company v. Minneapolis Asso., 247 U. S. 490, said that courts "will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require". See, also, to the same effect: Abercrombie v. Brinkman, 293 Fed. 375; Lewis v. Fifth-Third National Bank, 274 Fed. 587.

Except for procedural differences, this case is identical with White v. Stone, 78 F. (2d) 136. In that case the proceeding was an action for money had and received—here for mandamus—but in each, to secure the refund of taxes assessed against and paid by trustees, not liable, for the benefit of the beneficiary, who was. There it was held the trustees could only recover by showing superior equities in their favor. We can think of no reason why the same rule should not apply here. In either case the moral obligation is the same. In disposing of the case, the court said:

"Mrs. Stone is alive and the sole beneficiary under the trust. If the trustees are allowed to recover, it will redound to her benefit, and it is agreed that, had the income

in question been taxed to her instead of to the trustees, she would have been required to pay a greater sum than will be offset by the allowance of this plea. Clearly no injustice will be done her by so doing. Furthermore, Mrs. Stone, the sole beneficiary, is the real plaintiff in interest, and equity and justice require that her tax liability should bo offset against the claim of the trustees."

[fol. 39] Girard's case has been presented and argued with force and ability and, if the answer depended only on the ascertainment of its legal rights, the conclusion would have to be in its favor; but, as we have shown, the remedy by mandamus is controlled by equitable principles. Considered from that point of view, to grant it here would not vindicate a right but do a wrong. Because of that, we think it is our duty to leave the parties as we find them.

Affirmed.

A true copy.

——— ———, Clerk, of the United States Court of Appeals for the District of Columbia.

[fol. 40] Monday, May 18th, A. D. 1936.

April Term, 1936

No. 6618

United States ex Relatione Girard Trust Company, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

vs.

Guy T. Helvering, Commissioner of Internal Revenue

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Su-

preme Court, in this cause, be and the same is hereby, affirmed.

Per Mr. Justice Groner.

May 18, 1936.

Mr. Justice Robb took no part in the consideration or decision of this case.

[fol. 41] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1935

No. 6618

UNITED STATES ex Relatione GIRARD TRUST COMPANY, Trustee under the Will of John A. Brown, Jr., Deceased, Appellant,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

DESIGNATION OF RECORD ON PETITION FOR CERTIORARI

The Clerk will prepare the record for filing in the Supreme Court of the United States as follows:

1. The printed record in this Court.
2. The minute record of the argument of the cause.
3. The opinion.
4. The judgment.
5. This designation of record.
6. The Clerk's certificate.

H. C. Kilpatrick, Attorney for Appellant.

Served copy of within designation on attorney for Respondent this 17th day of July, 1936.

H. C. Kilpatrick (F. A. B.), Attorney for Petitioner.

Endorsed: No. 6618. United States ex relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., deceased, Appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. Designation of Record on the Petition for Certiorari. United States Court of Appeals for the District of Columia. Filed July 17, 1936. Moncure Burke, Clerk.

[fol. 42] [Endorsed:] In the United States Court of Appeals for the District of Columbia, October Term, 1935. No. 6618. United States ex Relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., Deceased, v. Guy T. Helvering, Commissioner of Internal Revenue. Designation of Record on the Petition for Certiorari. United States Court of Appeals for the District of Columbia. Filed Jul. 17, 1936. Moncure Burke, Clerk.

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and tyewritten pages numbered from 1 to 42, inclusive, constitute a true copy of the transcript of the record and proceedings of the said Court of Appeals as designated by counsel for Appellant in the case of United States ex relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., deceased, Appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue, No. 6618, April Term, 1936, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Twenty-second day of July, A. D. 1936.

Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, by C. Preston Gainor, Assistant Clerk. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.